Supreme Court, U.S.
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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1996

CPC INTERNATIONAL INC., PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The petition for a writ of certiorari in No. 97-296 asks this Court to review the decision of the Sixth Circuit only to the extent that it held that CPC International Inc. is not liable under the Comprehensive Environmental Response, Compensation, and Liability Act as an "operator" of a particular "facility" that was owned and operated by its subsidiary. In the same decision, the Sixth Circuit held that Aerojet-General Corporation, the parent of two corporations that later owned and operated the same facility, and against which CPC has a pending action for contribution, also is not liable as an "operator" of that facility.

The cross-petition presents the question whether, if the Court grants the petition for a writ of certiorari in No. 97-296, it also should review the Sixth Circuit's holding that Aerojet-General is not liable as an "operator."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, the respondents are the United States, Cordova Chemical Company of Michigan, Cordova Chemical Company, and the Michigan Department of Environmental Quality.[1]

Petitioner CPC International Inc. has no parent companies and has the following nonwholly owned subsidiaries:

Circulo Esmeralda, S.A. de C.V.
Corn Products Co. (India) Ltd.
Maghreb Alimentation S.A.
Maizena Brasil S.A.
Productos Modificados, S.A. de C.V.
Refinacoes de Milho, Brasil Ltda.
Refinerias de Maiz SAICF
S.B. Penick del Ecuador S.A.

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[1] The petitioner in No. 97-296, and a respondent in this case, is the Michigan Department of Environmental Quality, which formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the petition in No. 97-296 and the proceedings in the courts below, we will continue to refer to the State agency as the "MDNR."

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42 U.S.C. § 9607(a)(2) ..... *passim*

42 U.S.C. § 9613(f) 3, 6

Miscellaneous:

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioner CPC International Inc. respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in favor of Aerojet-General Corporation in this case if the Court grants the petition in No. 97-296.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.1a-42a), sitting *en banc*, is reported at 113 F.3d 572.[2] The opinion of the panel (Pet. App. 45a-77a) is reported at 59 F.3d 584. The opinion of the district court (Pet. App. 85a-142a) is reported at 777 F. Supp. 549.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1997. The petition for a writ of certiorari in No. 97-296 was docketed on August 15, 1997. This conditional cross-petition was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and S. Ct. R. 12.5.

STATUTE INVOLVED

Pertinent provisions of the Comprehensive Environmental Response, Compensation, and Liability Act are set forth at Pet. App. 146a-149a. Section 113(f)(1) of that Act, codified at 42 U.S.C. § 9613(f)(1), provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title * * * .

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[2] "Pet." and "Pet. App." refer respectively to the petition and to the appendix to the petition in No. 97-296. See S. Ct. R. 12.5.

STATEMENT

1. This case involves the allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for the cleanup of a site near Muskegon, Michigan. Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly-owned subsidiary of cross-petitioner CPC International Inc., from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of cross-respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. Pet. App. 87a-89a.

Several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court found CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for $1.65 million in response costs (plus future costs) incurred by the Michigan Department of Natural Resources ("MDNR") at the site. Pet. App. 144a.

The district court held that CPC was liable as an "operator" of the Muskegon facility under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). In the court's view, "section 107(a)(2) liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-piercing. Pet. App. 121a. The court stated that "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." *Id.* at 123a. Applying that test to the facts of this case, the court found

CPC liable because "the evidence shows active participation and control by CPC in Ott II affairs" (*id.* at 126a).[3]

Based on "the same framework used in CPC's case" (Pet. App. 134a), the district court also held that Aerojet was liable as an "operator" of the Muskegon facility. The court concluded that, "[a]s with CPC's involvement with Ott II, Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." *Id.* at 135a. In addition, the court held that Aerojet was separately liable as the "present owner" of the facility under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), because Cordova/Michigan owned the Muskegon site and there was a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of its subsidiary. *Id.* at 132a-134a.

CERCLA provides "[a]ny person" with a right to "seek contribution from any other person who is liable or potentially liable under [42 U.S.C.] section 9607(a)." 42 U.S.C. § 9613(f). CPC's contribution action against Aerojet and its subsidiaries was among the actions consolidated below. See Pet. App. 85a. The district court did not resolve any of the contribution claims, however, *id.* at 139a-140a, but dismissed them without prejudice. *Id.* at 81a. CPC reasserted its contribution claims against the Aerojet defendants in a new complaint filed in June 1994. *CPC International Inc.* v. *Aerojet-General Corp.*, No. 1:94 cv 432 (W.D. Mich., S. Div.). That case is in abeyance pending the final resolution of the liability issues.

2. The Sixth Circuit, sitting *en banc*, reversed the judgments against CPC and Aerojet under Section 107(a)(2). Contrary to the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on "the degree of control exerted by

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[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (Pet. App. 126a).

the parent over its subsidiary." Pet. App. 13a. Instead, the Sixth Circuit held that a parent may be held liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" (*ibid.*).

Applying that standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (Pet. App. 13a) or Aerojet (*id.* at 16a). The court of appeals also reversed the district court's decision that Aerojet could be held liable as an "owner," finding that the facts "fall somewhat short of what is required to pierce the corporate veil under Michigan law." *Id.* at 15a.

REASONS FOR GRANTING THE CROSS-PETITION

In the certiorari petition filed in No. 97-296, the MDNR asks this Court to decide whether CPC may be held liable under Section 107(a)(2) of CERCLA as an "operator" of its subsidiary's facility. As CPC's brief in opposition will explain, there is no reason to grant review of the Sixth Circuit's decision in this case. If the Court does grant review in No. 97-296, however, it should grant this cross-petition as well to consider the companion holding that absolved Aerojet of liability as an "operator" of the Muskegon facility.

Although the courts below disagreed on the content of the legal standards supporting the imposition of "operator" liability on the parent corporation of a company that operates a facility, both courts agreed that the claims against CPC and Aerojet rested on "*precisely the same basis* for liability" under Section 107(a)(2). Pet. App. 16a (emphasis added). The district court applied a *single* legal standard to CPC and Aerojet alike when it held that they *were* "operators" (*id.* at 126a, 134a-135a), and the court of appeals applied a *single* standard of "operator" liability to CPC and Aerojet alike in holding that they were *not* "operators" (*id.* at 12a-13a, 15a-16a). Accordingly, it would be

odd indeed to consider the question of "operator" liability only as it applied to CPC.

Moreover, in the Sixth Circuit Aerojet defended against operator liability solely on the ground that no disposal had taken place while its subsidiaries operated the Muskegon facility, in effect conceding that if the Cordova companies were operators, their parent was an operator as well. See Aerojet Appellants' C.A. Br. 24-32; Aerojet Appellees' C.A. Br. 28-36; Aerojet Supplemental Appellants' C.A. Br. 20-27. The court of appeals' holding on "operator" liability thus provided Aerojet — which, unlike its subsidiaries, is solvent — with relief from liability on a ground that Aerojet itself did not urge. Nonetheless, for reasons unexplained in the petition, the MDNR has chosen to seek review only of the portion of the judgment in favor of CPC.[4]

It would be grossly unfair to allow the judgment in favor of Aerojet to become final if there is any chance that the judgment in favor of CPC might be overturned. To begin with, the evidence that Aerojet actually operated the Muskegon facility was far stronger than that against CPC. Although the district court found that the day-to-day operations at the Muskegon site between 1965 and 1972 were formulated and implemented by Ott II management, *not* CPC (see Pet. App. 95a), the court found, by contrast, that Aerojet was directly involved in the operations of the facility from 1977 on, when the facility was owned first by Cordova/California and then by Cordova/Michigan (*id.* at 114a-115a). In fact, Aerojet itself

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[4] Although the MDNR has not discussed the issue, the most likely reason why it has not sought review against Aerojet is that the Michigan state courts, in parallel litigation, have held that the MDNR must indemnify Aerojet and its subsidiaries against any CERCLA liability they may incur at the Muskegon facility. See *Cordova Chemical Co.* v. *Michigan Dep't of Natural Resources*, 212 Mich. App. 144, 536 N.W.2d 860 (Mich. App.), lv. to appeal denied, 453 Mich. 899, 554 N.W.2d 319 (1996). MDNR appears to have crafted its petition in an effort to relieve itself of its own potential liability as Aerojet's indemnitor.

negotiated the acquisition of the Muskegon site for what was then its Cordova division (*id.* at 112a), incorporating Cordova/California "just before acquisition" (*id.* at 113a) and Cordova/Michigan a year later (*id.* at 114a).

What is more, the district court also concluded that Aerojet's domination of its Cordova subsidiaries was so complete that liability could be imposed by piercing the parent's corporate veil (Pet. App. 132a-133a)[5] — a finding that the court did not make in regard to CPC. In these circumstances, in the unlikely event that this Court chooses to review the question whether liability may be imposed under CERCLA on the parent corporations of companies that operated the Muskegon facility, it should do so on the complete record that was before the Sixth Circuit.

A gerrymandered review of the "operator" liability issue, as it relates to the Muskegon site, might have grossly inequitable consequences for another reason. There is at least some possibility that CPC's right to contribution from Aerojet under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), might be extinguished by a failure to challenge the portion of the Sixth Circuit's judgment in favor of Aerojet, see *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 399 n.4 (1981), because a party adjudged not liable under Section 107(a) cannot be subject to contribution under Section 113(f). See, *e.g.*, *AM International, Inc.* v. *International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir. 1993). Of course, Aerojet, as a party in the court of appeals, is a respondent in No. 97-296 (see S. Ct. R. 12.6; Pet. ii), entitled to file briefs in this Court and bound by this Court's judgment. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 324 (7th ed. 1993). Out of an abundance of caution, however, we have filed this cross-petition to bring before the Court the judgment in favor of Aerojet, in order to preserve CPC's right to obtain

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[5] For example, the Cordova "subsidiaries' board[s] of directors were inactive and nearly non-existent" (Pet. App. 115a-116a).

contribution from Aerojet in the event that this Court were to agree with the MDNR on the meaning of the term "operator" in Section 107(a)(2).

In sum, if the Court grants the petition in No. 97-296, it should grant this cross-petition as well. The MDNR's decision not to seek relief against Aerojet in this Court should not indirectly jeopardize CPC's ability to obtain contribution from Aerojet if the judgment against CPC is reinstated. The district court imposed joint and several liability on CPC and Aerojet under Section 107(a)(2), and the court of appeals reversed as to both defendants on a common legal theory. If the Court agrees to review that legal ruling, CPC and Aerojet should be similarly situated.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted if the Court grants the petition in No. 97-296.

Respectfully submitted.

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